

**ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE
DIVISION IV**

CACR06-690

February 7, 2007

RENE D. LEE

APPELLANT

APPEAL FROM SEBASTIAN COUNTY
CIRCUIT COURT, FORT SMITH
DISTRICT [NO. CR-96-587]

V.

HON. JAMES R. MARSCHEWSKI,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

The appellant was convicted of overdraft in 1996 and received a suspended imposition of sentence. She was ordered to pay approximately \$3,000 in restitution at the rate of \$75 per month. Ten years later, she had only paid a total of \$790 and \$2,301 remained to be paid. The State filed a petition to revoke alleging that she violated the terms of her suspension by failing to pay as ordered by the court. After a hearing, appellant's suspension was revoked and she was sentenced to two years' imprisonment. On appeal, appellant argues that the trial court clearly erred in finding that she willfully failed to pay. We find no error, and we affirm.

To revoke a suspended sentence, the State must prove by a preponderance of the evidence that the defendant inexcusably violated a condition of the suspended sentence. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). We will uphold the trial court's findings on appeal unless they are clearly against the preponderance of the evidence. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). In determining where the preponderance of the evidence lies, we defer to the trial judge's superior opportunity to determine the credibility and weight of the testimony. *Id.*

A defendant cannot be punished by imprisonment for failing to pay restitution if the sole reason for the failure was a lack of resources to pay, but imprisonment is justified in cases where a person has failed to make bona fide efforts to seek employment or to borrow money to pay restitution. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). In deciding whether failure to comply with an order to pay restitution is inexcusable, the trial court must consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. Ark. Code Ann. § 5-4-205(f)(3) (Repl. 2006).

In the present case, appellant testified that she was able to use computers and had worked as an administrative assistant, but that she had not earned much money and had been taking care of her mother. She further stated that she suffered a nervous breakdown in 2000 and has since been unable to work because she suffers from bipolar disorder and depression.

Appellant also stated that she was currently attempting to qualify for Social Security disability benefits based on mental illness, that her present application for benefits was her third attempt, and that previous applications had been denied. Finally, appellant admitted that she received a \$40,000 insurance settlement arising out of an automobile accident in 2001, but that none of this money was used for paying restitution. Instead, appellant testified that she “paid back everybody that I owed; my family took a great deal of it. I tried to live on the rest; maybe ten thousand.”

We cannot say that the trial court clearly erred in finding that appellant’s failure to pay restitution was inexcusable. Ten years had elapsed since the order was entered; appellant was by her own admission employed for much of this time; and appellant offered no explanation to show why the debts she paid from the proceeds of her \$40,000 insurance settlement were more compelling than her obligation to pay restitution of approximately \$3,000, or to explain why none of this considerable settlement was applied to her court-ordered restitution.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.